Multiband EC, Inc. *and* Chauffeurs, Teamsters, Warehousemen and Helpers, Local 135. Case 25–CA–108828

January 21, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

Upon a charge filed July 10, 2013, by Chauffeurs, Teamsters, Warehousemen and Helpers, Local 135, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on September 27, 2013, alleging that the Respondent has violated Section 8(a)(1) of the Act by maintaining a document entitled "Arbitration Agreement" (Agreement), which requires arbitration of employment-related claims and contains a "Class and Collective Action Waiver" provision specifying that all claims must be pursued on an individual basis, and by requiring employees to sign the Agreement as a condition of employment.

On April 30, 2014, the Respondent, the Charging Party, and the General Counsel filed with the Board a joint motion to waive a hearing and a decision by an administrative law judge and to transfer this proceeding to the Board for a decision based on a stipulated record. On September 12, 2014, the Board granted the parties' joint motion. Thereafter, the General Counsel filed with the Board a brief in support of its position, and the Respondent filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2] On the entire record and submitted briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with offices and places of business in Illinois, Indiana, Iowa, Kentucky, and Ohio. It engages in the business of installing receivers for satellite television and providing related satellite services. In conducting its operations during the 12-month period ending July 10, 2013, the Respondent purchased and received at its Indi-

[1] Both parties filed their briefs prior to the issuance of our decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part—F.3d—(5th Cir. 2015).

[2] In its answer to the complaint, the Respondent raised the following affirmative defense: "The Complaint is barred because, at all pertinent times, various officials of the Board involved in the prosecution of the Complaint were not validly appointed, including the Acting General Counsel. *Hooks v. Kitsap Tenant Support Services, Inc.,* Case No. C13–5470 BHS (W.D. Wash. Aug. 13, 2013)." However, the Respondent did not offer any evidence or argument in support of this affirmative defense at any time in this proceeding, including the parties' statement of the issue presented, the Respondent's statement of its position on the issue set forth in the parties' joint motion, and the Respondent's answering brief.

For the reasons set forth below, we find no merit in the Respondents' assertion that the Acting General Counsel was not validly "appointed." At the outset, we note that under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., a person is not "appointed" to serve in an acting capacity in a vacant office that otherwise would be filled by appointment by the President, by and with the advice and consent of the Senate. Rather, either the first assistant to the vacant office performs the functions and duties of the office in an acting capacity by operation of law pursuant to 5 U.S.C. § 3345(a)(1), or the President directs another person to perform the functions and duties of the vacant office in an acting capacity pursuant to 5 U.S.C. § 3345(a)(2) or (3). On June 18, 2010, the President directed Lafe Solomon, then-Director of the Board's Office of Representation Appeals to serve as Acting General Counsel pursuant to subsection (a)(3)—the senior agency employee provision. Under the strictures of that provision, Solomon was eligible to serve as Acting General Counsel at the time the President directed him to do so. See *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015). Thus, Solomon properly assumed the duties of Acting General Counsel and we find no merit in the Respondents' affirmative defense that the Acting General Counsel was "not validly appointed."

We acknowledge that the decision in *SW General* also held that Solomon lost his authority as Acting General Counsel on January 5, 2011, when the President nominated him to be General Counsel. While that question is still in litigation, the Respondents have never raised that argument in this proceeding, and we find that the Respondents thereby have waived the right to do so.

Finally, on December 2, 2015, General Counsel Richard F. Griffin, Jr., issued a notice of ratification which states, in relevant part,

> I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under section 3(d) of the Act.
>
> My action does not reflect an agreement with the appellate court ruling in *SW General*. Rather, my decision is a practical response aimed at facilitating the timely resolution of the charges that I have found to be meritorious while the issues raised by SW General are being resolved. Congress provided the option of ratification by expressly exempting "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. (Citation omitted.)
>
> For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

Thus, even assuming that the Respondent had not previously waived its right to challenge the continued authority of the Acting General Counsel following his nomination by the President, this ratification renders moot any argument that *SW General* precludes further litigation in this matter.

ana facilities goods valued in excess of $50,000 directly from points outside the State of Indiana.

The parties stipulated, and we find, that at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

A. Facts

Since about July 1, 2013, the Respondent has maintained and required employees to sign the Agreement as a condition of employment. The Agreement requires employees to "arbitrate any and all disputes, claims, or controversies" against the Respondent that could be brought in a court, including all claims arising out of their employment. The Agreement explicitly covers, but is not limited to, "claims under the Age Discrimination in Employment Act; Title VII of the Civil Rights Act of 1964; the Fair Labor Standards Act; the Family and Medical Leave Act; the Americans with Disabilities Act of 1990; Section 1981 through 1988 of Title 42 of the United States Code; any state or local anti-discrimination laws; or any other federal, state, or local law, ordinance or regulation." The Agreement also contains an exception stating that it "does not prohibit the filing of an administrative charge with a federal, state, or local administrative agency such as the National Labor Relations Board (NLRB) or the Equal Employment Opportunity Commission (EEOC)."[3]

The Agreement also includes the following provision:

> **Class and Collective Action Waiver**
>
> The parties agree all claims must be pursued on an individual basis only. By signing this Agreement, you waive your right to commence, or be a party to, any class or collective claims or to bring jointly any claim against the Company with any other person, except as provided in the paragraph below. The arbitrator shall have no power under this Agreement to consolidate claims and/or hear a collective or class action.
>
> In addition, nothing herein limits your right and the rights of others collectively to challenge the enforceability of this Agreement, including the class/collective action waiver. While the Company will assert that you have agreed to pursue all claims individually in the arbitral forum and may ask a court to compel arbitration of each individual's claims, to the extent the filing of such an action is protected concerted activity under the National Labor Relations Act, such filing will not result in threats, discipline or discharge.

The Agreement applies to all of the Respondent's employees nationwide, including supervisors.

B. The Parties' Contentions

The General Counsel contends that the Class and Collective Action Waiver in the Agreement violates Section 8(a)(1) under the Board's decision in *D. R. Horton Inc.*, 357 NLRB No. 184 (2012), which protects the right of employees to join together to pursue workplace grievances, including through litigation. The General Counsel asserts that the plain language of the Agreement is unlawful because it bars employees from collectively pursuing employment-related claims in all forums. The Respondent contends that the Agreement is lawful under recent Supreme Court decisions establishing the broad preemptive sweep of the Federal Arbitration Act (FAA). The Respondent asserts that the FAA mandates that arbitration agreements, including those containing class action waivers, be enforced according to their terms in the absence of an express "contrary congressional command." The Respondent claims that no such command exists in the Act. The Respondent also cites *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), which denied enforcement of the Board's *D. R. Horton* decision in relevant part, and decisions by other courts of appeals that found *D. R. Horton* unpersuasive.[4] Moreover, the Respondent argues that the Agreement does not infringe upon employees' Section 7 rights because it expressly "does not prohibit the filing of an administrative charge."[5]

C. Discussion

In *D. R. Horton*, the Board found that an employer violated Section 8(a)(1) of the Act by requiring its employees, as a condition of employment, to waive their right to collectively pursue employment-related claims in all forums, arbitral or judicial. 357 NLRB No. 184, slip op. at 13. The Board explained that it had long held, with uniform judicial approval, that the Act protects employees' substantive right to join together to pursue workplace

[3] The Agreement specifies that it does not cover workers' compensation and unemployment compensation benefit claims and "claims by law which are not subject to mandatory binding pre-dispute arbitration pursuant to the Federal Arbitration Act."

[4] For example, *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 fn. 8 (2d Cir. 2013), and *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013).

[5] The Respondent also argues that Member Becker's appointment expired before the decision in *D.R. Horton* issued. For the reasons set forth in *Murphy Oil*, above, slip op. at 2 fn. 16, we reject this argument. See *Leslie's Poolmart, Inc.*, 362 NLRB No. 184, slip op. at 1 fn. 1 (2015); see also *Mathew Enterprise, Inc. v. NLRB*, 771 F.3d 812, 814 (D.C. Cir. 2014) ("[T]he President's recess appointment of Member Becker . . . was constitutionally valid."); *Gestamp South Carolina, LLC v. NLRB*, 769 F.3d 254, 257–258 (4th Cir. 2014) (same).

grievances, including through litigation, and that individual agreements requiring employees to waive that right are unlawful. Id., slip op. at 2, 5. The Board noted that its decision does not conflict with the intent of the FAA, which was to leave substantive rights under other Federal laws undisturbed, as evidenced by the savings clause in Section 2 of the FAA. Id., slip op. at 11. Subsequently, in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part—F.3d—(5th Cir. 2015), the Board reexamined and reaffirmed the rationale of *D. R. Horton*. 361 NLRB No. 72, slip op. at 2.

For the reasons stated in *D. R. Horton* and *Murphy Oil*, we find that the Agreement in this case violates Section 8(a)(1). As in those cases, the Respondent conditions employment on its employees signing the Agreement and waiving their right "to commence, or be a party to, any class or collective claims." The Agreement requires employees to arbitrate all employment-related claims that otherwise could have been brought in court and strips arbitrators of the power "to consolidate claims and/or hear a collective or class action." The Respondent's contention that the Agreement is lawful under the FAA and Supreme Court precedent is without merit for the reasons stated in *Murphy Oil*.[6] Accordingly, we find that the Agreement unlawfully prohibits employees from concertedly pursuing employment-related claims in any forum.[7]

[6] The Respondent relies on the administrative law judge's decision in *Chesapeake Energy Corp.*, 362 NLRB No. 80 (2015), in which the judge found a mandatory arbitration agreement and class action waiver lawful. In that case, however, the Board reversed the judge. Id., slip op. at 1.

The Respondent also argues that the Agreement includes an exemption allowing employees to file charges with administrative agencies, including with the Board, and thus does not, as in *D. R. Horton*, unlawfully prohibit them from collectively pursuing litigation of employment claims in all forums. We reject the Respondent's argument for the reasons set forth in *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 2–4 (2015).

[7] Our dissenting colleague observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, supra, 361 NLRB No. 72, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 and fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, supra, slip op. at 2 (emphasis in original). The Respondent's Agreement is just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the Agreement unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 18; *Bristol Farms*, 363 NLRB No. 45, slip op. at 2. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, supra, slip op. at 17–18; *Bristol Farms*, supra, slip op. at 2.

CONCLUSIONS OF LAW

1. The Respondent, Multiband EC, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining a mandatory arbitration agreement under which employees are required, as a condition of employment, to waive the right to commence, or be a party to, any class or collective claims or to bring jointly any claim with any other person in all forums, whether arbitral or judicial, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall also order the Respondent to rescind or revise the Agreement and to notify employees that it has done so.

ORDER

The National Labor Relations Board orders that the Respondent, Multiband EC, Inc., New Hope, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms, to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at all of its facilities nationwide copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the Na-

provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix" to all current employees and former employees employed by the Respondent at any time since July 1, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 21, 2016

_____

Mark Gaston Pearce, Chairman

_____

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.[1]

In this case, my colleagues find that the Respondent's Arbitration Agreement (Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement waives the right to participate in class or collective actions regarding non-NLRA employment claims. I respectfully dissent from this finding for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[2]

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[3] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[4] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[5] (ii) a class-waiver agreement per-

tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] For the reasons stated by my colleagues, I agree that the complaint is properly before the Board for disposition.

[2] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, No. 14–60800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015).

[3] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu,* 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

[4] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[5] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12–60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

taining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class waiver agreements;[6] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[7] Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. January 21 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that requires you, as a condition of employment, to waive your right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms, to make clear to you that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

MULTIBAND EC, INC.

The Board's decision can be found at www.nlrb.gov/case/25-CA-108828 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[6] The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil, Inc., USA v. NLRB*, above; *D. R. Horton, Inc. v. NLRB,* above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil,* 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc*., 96 F. Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.,* No. 14–cv–04145–BLF, 2015 WL 1738152 (N.D. Cal. Apr. 13, 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.,* No. 1:12–cv–00062–BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA).

[7] For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil,* above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).